

Entered on Docket  
July 27, 2006  
GLORIA L. FRANKLIN, CLERK  
U.S. BANKRUPTCY COURT  
NORTHERN DISTRICT OF CALIFORNIA

1                           **FILED**  
2                           JUL 26 2006  
3                           CLERK  
4                           United States Bankruptcy Court  
5                           San Jose, California

8                           UNITED STATES BANKRUPTCY COURT  
9                           NORTHERN DISTRICT OF CALIFORNIA

10          In re   ] Case No. 05-59499-ASW  
11          David R. Bricksin and                           ] Chapter 7  
12          Vivian M. Bricksin,  
13   ] Debtors.  
14   ]

15                           MEMORANDUM DECISION  
16                           ON THE UNITED STATES TRUSTEE'S MOTION TO DISMISS

18          Before the Court is the motion of the United States Trustee  
19          ("Trustee") to dismiss the chapter 7 case of David R. Bricksin and  
20          Vivian M. Bricksin ("Debtors"). Trustee brought this motion  
21          pursuant to 11 U.S.C. §§ 707(a), 109(h) and 521(b) and Interim Rule  
22          1007(b)(3) asserting that Debtors failed to file certificates from  
23          an approved credit counseling agency evidencing Debtors' receipt of  
24          credit counseling within the 180-day period preceding the date of  
25          filing the petition.

26          This Memorandum Decision constitutes the Court's findings of  
27          fact and conclusions of law, pursuant to Rule 7052 of the Federal  
28          Rules of Bankruptcy Procedure.

1 I.

2 PROCEDURAL BACKGROUND

3  
4 Debtors filed a voluntary petition under chapter 7 of the  
5 Bankruptcy Code ("Petition") on November 22, 2005. On December 2,  
6 2005, Trustee filed a "Motion by United States Trustee to Dismiss  
7 Chapter 7 Case" ("Motion to Dismiss").

8 On January 9, 2006, Debtors filed "Debtor's Response to United  
9 States Trustee's Motion to Dismiss Chapter 7 Case" ("Debtor's  
10 Response"), along with the "Declaration of David Bricksin, with  
11 Exhibits, in Support of Debtor's Response to United States  
12 Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of David  
13 Bricksin"). On February 22, 2006, Trustee filed a "Memorandum of  
14 Law in Further Support of the Motion by United States Trustee to  
15 Dismiss Chapter 7 Case" ("Trustee's Memorandum of Law"). On March  
16 20, 2006, Debtors filed "Debtor's Supplemental Response to United  
17 States Trustee's Motion to Dismiss Chapter 7 Case and Debtors  
18 Response to Memorandum of Law in Further Support of the Motion by  
19 United States Trustee to Dismiss Chapter 7 Case: Declaration of  
20 David Bricksin" (Debtors' Supplemental Response").

21 On April 3, 2006, Trustee filed a "Reply to Debtors'  
22 Supplemental Response to United States Trustee's Motion to Dismiss  
23 Chapter 7 Case" ("Trustee's Reply to Debtor's Supplemental  
24 Response") and an accompanying "Declaration of Shannon L. Mounger  
25 in Support of Reply to Debtor's Supplemental Response to United  
26 States Trustee's Motion to Dismiss Chapter 7 Case" ("Declaration of  
27 Mounger").

28 The matter was fully briefed and argued on May 4, 2006.

1 Debtors appeared *in propria persona*. Trustee was represented by  
2 Shannon L. Mounger, Esq. The Court heard testimony from the  
3 Debtors at the hearing.

4 II.

5 STATEMENT OF FACTS<sup>1</sup>

6  
7 The facts of this case are undisputed.

8 Debtors' financial difficulties began when, sometime in 2004<sup>2</sup>,  
9 David Bricksin lost a relatively high-paying job. As a result of  
10 this unexpected calamity, Debtors were no longer able to afford  
11 their then-current lifestyle. Concerned about their mounting  
12 debts, David Bricksin contacted Consumer Credit Counseling Services  
13 ("CCCS").

14 Debtors sought the professional assistance of CCCS to evaluate  
15 their options. CCCS conducted a counseling session with Debtors.  
16 The session was held on or about October 19, 2005.<sup>3</sup> During the  
17 course of the counseling provided by CCCS, the Debtors received

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18  
19       <sup>1</sup> The information in this section comes from the  
20 Declaration of David Bricksin dated January 8, 2006, the  
21 Declaration of Mounger dated April 3, 2006, the Exhibits attached  
to the declarations, and the testimony received at the hearing.

22       <sup>2</sup> The actual date when Mr. Bricksin lost his job does not  
23 appear in the record, but it can be inferred from the circumstances  
that it occurred sometime in 2004. In any event, the exact date is  
24 of no legal consequence.

25       <sup>3</sup> The Trustee points to CCCS's October 19, 2004 Letter to  
26 David Bricksin, attached to the Declaration of Mounger as Exhibit  
27 A, as evidence that Debtors participated in a credit counseling  
session on October 19, 2004. See Trustee's Reply to Debtor's  
Supplemental Response. However, the Declaration of David Bricksin,  
indicates that the services of CCCS were sought "[e]arly in 2005".  
The Court finds that the Trustee's account is correct, and that Mr.  
Bricksin must have been mistaken as to the date of the counseling  
session.

1 instruction in financial management and actively participated in a  
2 financial management course. They provided all of their financial  
3 information to CCCS, including their current income, living  
4 expenses, assets and liabilities. CCCS then analyzed the  
5 information and provided Debtors with customized recommendations.  
6 Based on this information, CCCS advised the Debtors that they did  
7 not have sufficient resources to repay their debts and recommended  
8 that they file for bankruptcy protection. Debtors were determined,  
9 however, to make an effort to repay their creditors without the aid  
10 of a bankruptcy filing.

11 With CCCS's professional expertise, a customized action plan  
12 was created, which contained recommendations and options for the  
13 Debtors.<sup>4</sup> As a part of this customized plan, CCCS developed a  
14 repayment plan for the Debtors which was designed to allow Debtors  
15 to reimburse their creditors. The repayment plan called for  
16 monthly payments of \$2,200.00 toward their debts.

17 Debtors made regular and significant payments pursuant to the  
18 repayment plan until July 2005. The total funds paid to creditors  
19 under the repayment plan exceeded \$11,000.00. Sometime in July  
20 2005, when the Debtors were running out of money and came to the  
21 realization that they could no longer afford to continue with the  
22 debt repayment plan, David Bricksin contacted CCCS again in an  
23 effort to discuss with CCCS their financial situation. During this  
24 conversation, Mr. Bricksin was told that the repayment plan would  
25 be discontinued and that Debtors could not contact CCCS regarding  
26 credit counseling services for five years. On July 28, 2005, CCCS  
27 sent a letter, addressed to David Bricksin, stating that Debtors'

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28                  <sup>4</sup> Neither party has provided the Court with a copy of the debt repayment plan prepared by CCCS.

1 financial circumstances no longer allowed them to continue with the  
2 repayment plan.<sup>5</sup> The Bricksins, of course, were aware of that fact  
3 -- they had just told CCCS that they were unable to do so.

4 Debtors filed for bankruptcy protection on November 22, 2005.  
5 As discussed above, before making this decision, Debtors had  
6 consulted CCCS, a professional credit counseling agency, considered  
7 the effect a bankruptcy filing would have on their lives, rejected  
8 CCCS' advice that they file for bankruptcy, developed a debt  
9 repayment plan with CCCS, attempted to repay creditors and, in  
10 fact, made payments to creditors in excess of \$11,000.00. Their  
11 decision to seek bankruptcy relief was clearly the result of a  
12 well-informed, deliberate process. Debtors were in the process of  
13 carrying out the repayment plan (*i.e.*, making substantial monthly  
14 payments to their creditors) within the 180-day period prior to  
15 filing.

16 The second page of the Debtors' Petition contains a section  
17 entitled "Certification Concerning Debt Counseling by  
18 Individual/Joint Debtor(s)". In this section appear two boxes. To  
19 the right of the first box is the sentence "I/we have received  
20 approved budget and credit counseling during the 180-day period  
21 preceding the filing of this petition". Adjacent to the second box  
22 is the following statement: "I/we request a waiver of the  
23 requirement to obtain budget and credit counseling prior to filing  
24 based on exigent circumstances. (Must attach certification  
25 describing.)". On the Petition, Debtors checked the first box. At  
26 the time the Petition was filed, Debtors did not attach a  
27 certificate regarding their receipt of credit counseling to the

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28 <sup>5</sup> A copy of the July 28, 2005 letter is attached to the Declaration of David Bricksin as Exhibit 2.

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1 Petition, nor did they file one separately.

2 The Trustee filed the instant Motion to Dismiss on December 2,  
3 2005. Attached to the Declaration of David Bricksin accompanying  
4 Debtors' Response as Exhibit 4(a) is a certificate which states as  
5 follows:

6 "I CERTIFY that on 12-22-2005, DAVID R BRICKSIN received  
7 from Consumer Credit Counseling Service, an agency approved  
8 pursuant to 11 U.S.C. § 111 to provide credit counseling,  
9 an individual briefing (including a briefing conducted by  
10 telephone or the Internet) that complied with the  
provisions of 11 U.S.C. §§ 109(h) and 111. A debt  
repayment plan was not prepared. If a debt repayment plan  
was prepared, a copy of the debt repayment plan is attached  
to this certificate."

11 Exhibit 4(a) is dated December 22, 2005, and is electronically  
12 signed by Kathryn Gillespie, Counselor. Also attached to the  
13 Declaration as Exhibit 4(b) is another certificate, identical in  
14 all respects to Exhibit 4(a), except that it names "VIVIAN  
15 BRICKSIN" as the recipient of credit counseling. According to  
16 Exhibits 4(a) and 4(b), Debtors again received credit counseling on  
17 December 22, 2005 -- one month after filing the Petition. Thus,  
18 Debtors twice paid for and received credit counseling.  
19

20 The Court held a hearing on the Motion to Dismiss on May 4,  
21 2006. Both Debtors testified at the hearing.

22 III.  
23

24 APPLICABLE LAW

25 Trustee brings its Motion to Dismiss pursuant to 11 U.S.C. §§  
26 109(h), 521(b), 707(a) and Interim Rule 1007(b)(3).

27 Congress recently enacted the Bankruptcy Abuse Prevention and  
28 Consumer Protection Act of 2005 ("BAPCPA"). The provisions of the  
BAPCPA became effective on October 17, 2005.

1       Section 109(h), which was added to the Code as a part of the  
2 BAPCPA, provides, in pertinent part, that "an individual may not be  
3 a debtor under this title unless such individual has, during the  
4 180-day period preceding the date of filing of the petition by such  
5 individual, received from an approved nonprofit budget and credit  
6 counseling agency described in section 111(a) an individual or  
7 group briefing (including a briefing conducted by telephone or on  
8 the Internet) that outlined the opportunities for available credit  
9 counseling and assisted such individual in performing a related  
10 budget analysis." 11 U.S.C. §109(h)(1) (2005).

11       This Court has adopted the Interim Rules prepared by the  
12 Advisory Committee on Bankruptcy Rules pursuant to General Order  
13 No. 16 dated September 23, 2005. Interim Rule 1007(b)(3) states,  
14 in relevant part, that "an individual must file the certificate and  
15 debt repayment plan, if any, required by § 521(b)." Federal Rules  
16 of Bankruptcy Procedure, Interim Rule 1007(b)(3) (2005). Section  
17 521(b), also effective October 17, 2005, requires that the debtor  
18 file with the court "(1) a certificate from the approved nonprofit  
19 budget and credit counseling agency that provided the debtor  
20 services under section 109(h) describing the services provided to  
21 debtor; and (2) a copy of the debt repayment plan, if any,  
22 developed under section 109(h) through the approved nonprofit  
23 budget and credit counseling agency referred to in paragraph (1)." 11  
24 U.S.C. § 521(b) (2005).

25       Section 707(a) provides for dismissal of a case for cause. 11  
26 U.S.C. § 707(a) (2005). The section lists a number of examples  
27 which constitute "cause", but this list is illustrative and not  
28 exhaustive. In re Padilla, 222 F.3d 1184, 1191 (9th Cir. 2000).

1 Trustee submits that Debtors failed to obtain credit counseling  
2 from an approved agency within the 180-day period prior to filing  
3 the Petition and failed to file the certificate required by  
4 § 521(b). Trustee argues that these failures constitute cause for  
5 dismissal of Debtors' case under § 707(a). Debtors contend that  
6 they did comply with the relevant statutory requirements and,  
7 accordingly, the Trustee's Motion to Dismiss should be denied.

8                          IV.

9                          ANALYSIS

10                         The Petition was filed on November 22, 2005, and thus all  
11 statutory amendments contained in the BAPCPA apply in this case.

12                         Read in tandem, §§ 109(h), 521(b), 707(a) and Interim Rule  
13 1007(b) (3) require the Debtors to receive credit counseling from an  
14 approved agency within the 180-day period prior to filing the  
15 Petition, and to file a certificate evidencing their receipt of the  
16 pre-petition counseling in order to be eligible Debtors under the  
17 Bankruptcy Code.

18                         Construed strictly, Debtors have not satisfied the letter of  
19 the statutory requirements. Debtors did receive credit counseling,  
20 but the date of the initial session was not within the 180-day  
21 period prior to filing. While the Debtors checked the box on the  
22 Petition to indicate receipt of pre-petition counseling, they did  
23 not attach the certificates required by Interim Rule 1007(b) (3).<sup>6</sup>

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26                         <sup>6</sup> Debtors did attach certificates which appear to show  
27 their receipt of credit counseling to the Declaration of David  
28 Bricksin (Exhibits 4(a) and 4(b) referenced in section II(C)  
above). Both of these certificates are dated December 22, 2005,  
exactly one month after the Petition date. Thus, these  
certificates apparently relate to post-petition counseling, and do  
not fulfill the statutory requirements.

1       However, the intent of Congress in enacting these particular  
2 provisions of BACPCA is clear. The statutory provisions requiring  
3 debtors to receive credit counseling before they can be eligible  
4 for bankruptcy relief were enacted so that debtors "will make an  
5 informed choice about bankruptcy, its alternatives, and  
6 consequences." H.R. Rep. No. 109-031, at 2 (2005). As one court  
7 has stated, "[t]he statute is clear in that it unequivocally  
8 requires that the credit counseling be obtained *prior to* the filing  
9 of the petition." In re Warden, No. 05-23750, 2005 WL 3207630  
10 (Bankr. W.D. Mo. Nov. 22, 2005) (emphasis added). Congress'  
11 objective "in enacting the credit counseling requirement is that  
12 focusing on a budget analysis with the help of a credit counseling  
13 professional might obviate the need for seeking bankruptcy relief  
14 for some debtors." Id. The Warden court dismissed the debtor's  
15 petition for failure to obtain credit counseling pre-petition,  
16 finding that the Congressional intent is not upheld by receiving  
17 post-petition counseling. Id.

18       The Court finds that application of the statutory scheme to  
19 dismiss this case, as the Trustee urges, would produce a result at  
20 odds with Congressional intent. The intent behind these statutory  
21 amendments is to encourage debtors to seek alternatives to the  
22 bankruptcy process and to promote debtor awareness of the effects  
23 of a bankruptcy filing by requiring pre-petition credit counseling.  
24 Debtors had received extensive pre-petition credit counseling and  
25 then -- during the 180-day period prior to filing for bankruptcy --  
26 were proceeding with their repayment plan, and making very  
27 substantial payments to creditors. While failing to comply with  
28 the law's technical letter, the Debtors were clearly in compliance

1 with its spirit. The Court finds that the Debtors' need for a  
2 bankruptcy filing was not and could not have been obviated by  
3 additional credit counseling. Debtors were keenly aware of the  
4 implications of the bankruptcy filing. Indeed, CCCS had advised  
5 the Debtors that their only viable option was to file for  
6 bankruptcy.

7 While the credit counseling session attended by Debtors was  
8 held outside of the 180-day period prescribed by the statute, the  
9 Court is persuaded that Debtors' participation in and performance  
10 under a debt repayment plan constitutes ongoing credit counseling  
11 sufficient to satisfy the statutory requirement on the individual  
12 and unusual facts of this case. Debtors performed under the  
13 repayment plan until July 2005, less than 180 days before filing  
14 the Petition. This performance necessitated that Debtors write a  
15 substantial check each month toward the payment of their debts.  
16 Debtors were no less aware of their financial predicament in July  
17 2005 than they were at the time their counseling session was held.  
18 The Court finds that Debtors' completion of credit counseling, and  
19 then ongoing performance under the debt repayment plan within the  
20 180-day period prior to filing, fulfills the spirit of the  
21 statutory requirement. This is especially true here, where the  
22 credit counselor advised Debtors to file for bankruptcy in the  
23 first place. Debtors did not follow that advice and attempted to  
24 carry out a repayment plan. Then, after making substantial  
25 payments to their creditors, Debtors accepted the reality of their  
26 situation and filed for bankruptcy -- as CCCS had initially advised  
27 them to do.

28 Counsel for the Trustee pointed out at the hearing that the

1 agency from which Debtors received counseling was not on the  
2 approved list of providers at that time. However, that provider  
3 was subsequently approved in September 2005, prior to the effective  
4 date of the BAPCPA.<sup>7</sup> This situation is perfectly understandable in  
5 the context of this brand new legislation. The Bankruptcy Court is  
6 a court of equity. Debtors have already paid for and completed two  
7 credit counseling sessions. It would be inequitable for this Court  
8 to hold that these Debtors' technical non-compliance with the law,  
9 despite their very best efforts, warrants dismissal of this case,  
10 which would require these Debtors to start all over, to pay another  
11 \$299.00 filing fee, and potentially deprive them of the protection  
12 of the automatic stay.<sup>8</sup>

13 V.

14 CONCLUSION

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16 Despite Debtors' technical non-compliance with the statutory  
17 scheme, Debtors clearly complied with the spirit of the rule. In  
18 the context of this new statute, this unique set of facts is  
19 unlikely to present itself again. Application of the law in this

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21       <sup>7</sup> Counsel for the Trustee noted that the providers approved  
22 by the Trustee were required to go through an application process  
23 and that some providers were required to change their procedures to  
24 receive approval. However, the Trustee does not suggest that the  
25 Debtors in fact were improperly counseled or misled in any way. To  
26 the contrary, all of the available evidence suggests that Debtors  
27 acted responsibly and made every effort to comply with the spirit  
of the statutory requirements. Moreover, The Trustee certainly  
could have advised the Court if CCCS's procedures had to be  
revamped following BAPCPA. The Trustee presumably would have  
access to that information and did not introduce any evidence to  
that effect.

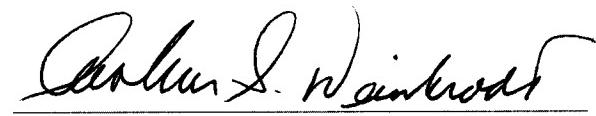
28       <sup>8</sup> Debtors list a secured vehicle debt relating to a 2002  
Chevrolet Suburban on their Schedule D which is potentially  
affected by the automatic stay.

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1 case to dismiss Debtors' petition would contravene Congressional  
2 intent. Therefore, the Trustee's Motion to Dismiss is denied.

3 Dated:

4 7/26/06

  
5  
6 ARTHUR S. WEISSBRODT  
7 UNITED STATES BANKRUPTCY JUDGE  
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UNITED STATES BANKRUPTCY COURT  
For the Northern District of California

1 Court Service List  
2 David R. Bricksin  
PO Box 1317  
3 Los Gatos, CA 95031-1317  
4 Vivian M. Bricksin  
PO Box 1317  
5 Los Gatos, CA 95031-1317  
6 Mohamed Poonja  
P.O. Box 1510  
7 Los Altos, CA 94023-1510  
8 Office of the U.S. Trustee  
U.S. Federal Bldg.  
9 280 S 1st St. #268  
San Jose, CA 95113-3004  
10 Shannon L. Mounger  
11 Office of the U.S. Trustee  
280 S 1st St. #268  
12 San Jose, CA 95113-0002  
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